BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LAURA P. GOMEZ	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,030,762
	)	
TYSON FRESH MEATS, INC.	)	
Self-Insured Respondent	)	

ORDER

The self-insured respondent requests review of the October 9, 2006 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

ISSUES

At the October 6, 2006 preliminary hearing the claimant was seeking medical treatment for her right upper extremity. The respondent agreed claimant suffered a series of work-related injuries to her left upper extremity through April 20, 2005, and had provided medical treatment for those injuries. But respondent argued claimant had reached maximum medical improvement for her left upper extremity and the claimant's current right upper extremity condition is not related to the original injury to the left upper extremity.

The Administrative Law Judge (ALJ) noted that claimant originally alleged bilateral shoulder injuries but that her date of accident should be amended to include aggravations after April 20, 2005. The ALJ determined the claimant's bilateral shoulder injuries arose out of and in the course of employment with the respondent and therefore ordered respondent to provide medical treatment with Dr. Melhorn.

The respondent requests review of whether the claimant's right shoulder injury arose out of and in the course of employment as well as whether timely notice and written claim was provided.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The claimant's job for the respondent was checking meat and putting it into a box. In April 2005 the claimant began having problems with both shoulders and her neck. But her main complaint was the pain in her left shoulder. She advised her supervisor and was referred to the company's infirmary for treatment. Treatment consisted of a rubbing cream and medication for pain. The respondent's injury/illness information form only detailed pain in the left shoulder, scapula and neck.[1] But claimant did not fill out the form as she does not speak or read English. And the form was not read to her as she merely signed the form.

Claimant was initially provided medical treatment with Dr. Dale G. Garrett. The treatment was for the left shoulder complaints. The treatment records do not reference right shoulder complaints. Claimant was then referred to Dr. Thomas P. Phillips and, ultimately, he performed surgery on the claimant's left shoulder on November 3, 2005. On May 3, 2006, the doctor determined the claimant had reached maximum medical improvement and released her to return to work. Dr. Phillips placed permanent work restrictions on the claimant. The claimant continued to work for the respondent while looking for a permanent job within her restrictions. When she returned to work she continued to have constant pain in her shoulders and neck. Claimant was unable to find a job with respondent that was within her restrictions. The last day the claimant worked for the respondent was June 30, 2006.

At claimant's attorney's request, the claimant was examined and evaluated by Dr. Michael H. Munhall on August 1, 2006. Although Dr. Munhall determined claimant had reached maximum medical improvement for her left shoulder he further detailed complaints with claimant's right shoulder which she attributed to her work for respondent before her left shoulder surgery.

The claimant denied that her first complaint of shoulder pain was made to Dr. Munhall and instead testified that she had told the other doctors about her right shoulder pain. She further testified the doctors told her the right shoulder pain derived from the left shoulder. And the right shoulder pain increased as she used only her right arm while she worked before the surgery for her left shoulder. Claimant testified that when she complained to the plant nurse about her increasing right shoulder pain she was told that her pain was related to the left shoulder and it would go away after the surgery. But she noted that in April 2005 she was experiencing pain in both of her shoulders as she worked.

Claimant noted that she continued to have pain in her right shoulder but that it worsened after she worked with only one arm the few months before the surgery on her left shoulder. She testified:

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[1] P.H. Trans., Cl. Ex. 3.

> Q. You told him that before the surgery performed by Doctor Phillips you were transferred to a different position that required opening the mouths of cattle using your right arm and that's true?
>
> Interpreter: Yes. Before my operation I worked with my one hand. That's when I started feeling the pain in my right shoulder.
>
> Q. How long before Doctor Phillips' surgery were you transferred to this other position?
>
> Interpreter: I don't recall exactly. But it was a fairly lengthy time when I worked with one hand, one arm.
>
> Q. The job that you were doing and as you described to Doctor Munhall speaks of opening the mouths of cattle using your right forearm to do that; is that correct?
>
> Interpreter: Before my surgery that's what I would do, I continued working with one arm.[2]

The claimant alleged injury to both shoulders and neck as a result of the repetitive work activities she performed up to April 20, 2005. Although her main complaint was to her left shoulder, neck and scapula, she testified she continued to make complaints regarding her right shoulder. As she was provided treatment directed to her left shoulder she continued to work and at some point was provided a job which she stated was performed using only her right hand and arm. As she performed this job her right shoulder pain increased.

Respondent argues that the work at the different position resulted in a new accident for which claimant neither provided notice nor claim. This Board Member disagrees.

When a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[3] The Board acknowledges that where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause, it would not be compensable.[4]

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[2] *Id*. at 20-21.

[3] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[4] *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

In *Jackson*[5], the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1)

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*, the Court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.[6]

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*[7], the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*[8], the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

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[5] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[6] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[7] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[8] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

In *Logsdon*[9] the Kansas Court of Appeals reviewed the foregoing cases and noted a distinguishing fact is whether the prior underlying injury had fully healed. If not, subsequent aggravation of the injury even when caused by an unrelated accident or trauma may still be a natural consequence of the original injury.

The claimant described injury to both her shoulders and although treatment was initially directed to her left shoulder she noted she continued to have right shoulder pain which persisted at a level of 3 out of 10 before she was changed to a job which she described as performing with only her right arm. Her right shoulder pain then increased. Simply stated, her underlying injury to her right shoulder had never received treatment nor healed as the medical treatment was provided to her left shoulder. Then as she continued working her right shoulder pain worsened. This subsequent worsening and aggravation of the right shoulder is compensable as a natural consequence of the original injury. Moreover, as the right shoulder was originally injured along with the left shoulder, the claim is compensable as part the original underlying series of injury through April 20, 2005.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[11]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated October 9, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2007.

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BOARD MEMBER

c: C. Felix Sanchez, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge

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[9] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

[10] K.S.A. 44-534a.

[11] K.S.A. 2005 Supp. 44-555c(k).